United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1311

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1311

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P/S

SCENIC HUDSON PRESERVATION CONFERENCE, THE HUDSON RIVER FISHERMEN'S ASSOCIATION, INC., THE SIERRA CLUB and its ATLANTIC CHAPTER, and THOMAS R. LAKE,

Plaintiffs-Appellees,

—against—

HOWARD H. CALLAWAY, individually and as Secretary of the Army, Department of Defense, U.S.A., LT. GENERAL WILLIAM C. GRIBBLE, individually and as Chief of Engineers, Corps of Engineers, U. S. Army and COL. HARRY W. LOMBARD, individually and as District Engineer, New York District, Corps of Engineers, U. S. Army,

Defendants-Appellees,

—and—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant-Appellant.

BRIEF OF FEDERAL DEFENDANTS-APPELLEES, CALLAWAY, GRIBBLE AND LOMBARD

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Dated: April 22, 1974

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Statement of the Case

Defendant-Appellee, Consolidated Edison Company of New York, Inc., appeals from a portion of a final judgment entered in the Southern District of New York on January 7, 1974 (159a-160a). The judgment followed the filing of a memorandum decision (as yet not officially reported)*

*The text of the decision appears in the BNA Environment Reporter, 6 ERC 1241, and in the Joint Appendix at 135a.

signed by United States District Judge Morris E. Lasker on December 28, 1973. A timely motion for the entry of an amended judgment was made by the four plaintiffs-appellees,* Scenic Hudson Preservation Conference, the Hudson River Fishermen's Association, Inc., The Sierra Club and its Atlantic Chapter, and Thomas R. Lake, on January 14, 1974 (161a-162a). That motion was denied on January 29, 1974 (178a).

The portion of the judgment appealed from by Con Edison enjoins the company from discharging dredged or fill material into the Hudson River in connection with the construction of its pumped-storage project at Storm King mountain unless and until it obtains a permit from the Army Corps of Engineers pursuant to Section 404 of the Water Pollution Control Act Amendments of 1972 ("the 1972 Amendments"). The judgment also declared that Con Edison was *not* required to obtain a permit from the Corps of Engineers under Section 10 of the Rivers and Harbors Act of 1899 for the placing of fill in the Hudson River in connection with the Storm King project. Scenic Hudson has filed a cross-appeal, Docket No. 74-1421, from the Section 10 portion of the judgment.**

The defendants-appellees, Callaway, Gribble and Lombrad, each an official of the United States Army and/or its Corps of Engineers, rest on the judgment and memorandum-decision of the District Court below.

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* Hereafter the four plaintiffs-appellants-appellees will be referred to collectively as "Scenic Hudson".

** Scenic Hudson's brief in support of its cross-appeal is to be filed on April 22, 1974. The Army Corps of Engineers' answering brief is to be filed on May 13, 1974.

Issues Presented

1. Whether the 1972 Amendments are inapplicable to the discharge of dredged or fill material done in connection with the construction of hydroelectric projects licensed by the Federal Power Commission?

2. Whether the 1972 Amendments in fact amend the Federal Water Power Act of 1920 and therefore constitute an impermissible limitation on licenses already issued by the Federal Power Commission?

Statement of Facts

As noted by the District Court, we now find ourselves in "the third round of federal litigation involving the controversial Storm King project since approval for its construction was first sought in 1963" (136a). As this Court well knows from its two prior decisions, *Scenic Hudson Preservation Conference* v. *Federal Power Commission,* 354 F.2d 608 (2nd Cir. 1965) *cert. denied sub nom., Consolidated Edison Co.* v. *Scenic Hudson Preservation Conference,* 384 U.S. 941 (1966) [*"Scenic Hudson I"*] and *Scenic Hudson Preservation Conference* v. *Federal Power Commission,* 453 F.2d 463 (2nd Cir. 1971), *cert. denied,* 407 U.S. 926 (1972) [*"Scenic Hudson II"*], the disputed project entails the construction of a pumped storage hydroelectric facility on the west bank of the Hudson River at Storm King mountain in the vicinity of Cornwall, New York. If ever built, it will be the largest facility of its kind with a generating capacity in excess of 2,000 megawatts. It has been designed to provide additional electric power during periods of peak demand for residents of New York City and parts of Westchester County (51a-52a).

The marathon administrative proceedings on Con Edison's application for the Storm King license commenced in January of 1963. Shortly thereafter the Federal Power Commission solicited the views of the Army Corps of

Engineers with respect to the construction of the project structures in so far as it might affect navigation (90a). Approval by the Army Corps of Engineers for the construction of such structures is required by Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e). By letter dated June 7, 1963, the Army Corps of Engineers, by its Assistant Director of Civil Works for Eastern Divisions, indicated to the Commission that "[t]he plans of the structures affecting navigation are satisfactory" (91a).

On March 9, 1965 a license was issued by the Federal Power Commission for the Storm King Project. 33 FPC 428. However, on review the license was successfully challenged and this Court remanded for further hearings to consider the project's impact on the environment. *Scenic Hudson I, supra.*

On remand an extensive record on the project's effect on the environment was compiled. Once again the Commission solicited the Army Corps of Engineers' approval for project structures affecting navigation (102a). By letter dated July 29, 1966 the approval required by Section 4(e) of the Federal Power Act was granted (103a). A decision favorable to Con Edison was subsequently rendered by the Hearing Examiner and on August 19, 1970 the five members of the Commission issued a second licensing order for the Storm King project. 44 FPC 350. Once again the license was challenged in the Court of Appeals. But this time it was found that in issuing the license the FPC had "fully complied with our earlier mandate and with the applicable statutes. . . ." *Scenic Hudson II, supra,* at 467. Certiorari was denied by the Supreme Court 407 U.S. 926 (1972).

The path was still not clear of obstacles to the commencement of construction. Two further government permit hurdles presented themselves. The first resulted from the passage of the Federal Water Quality Improvement Act of 1970, P.L. 91-224, 84 Stat. 91 (1970). Section 21(b)

of the 1970 Act* requires all applicants for federal licenses that might result in a discharge into navigable waters to obtain a certificate from the state in which the discharge originates assuring that the activity "will be conducted in a manner which will not violate applicable water quality standards." 33 U.S.C. (1970 Ed.) § 1171. As a condition to the grant of the FPC license, Con Edison was required to obtain such a water quality certificate within one year. Application was made and hearings were conducted by the New York State Department of Environmental Conservation. On August 17, 1971 a water quality certificate was issued for the Storm King project and on the following day it was filed with the Federal Power Commission (45a-46a). The Treasurer of Scenic Hudson then sought review in the state courts. The case finally reached the New York State Court of Appeals where, in a decision by then Chief Judge Fuld, the grant of the water quality certificate was upheld as "rational and reasonable." *de Rham* v. *Diamond,* 32 N.Y. 2d 34, 343 N.Y.S. 2d 84, 98 (1973).

The second hurdle to the commencement of construction was presented by Section 404 of the 1972 Amendments which is the subject of this appeal by Con Edison. Section 404(a) empowers the Corps of Engineers under specified conditions to grant permits for "the discharge of dredged or fill materials into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The project entails the placing of fill material in the river to create a recreational park in the village of Cornwall and to cover up transmission cables which will stretch across the Hudson. In addition some temporary placement of fill material will be necessary to facilitate construction of the project. Initially the Corps of Engineers expressed the view that a Section 404 permit would *not* be required for this work. On April 3, 1973, in response to an inquiry from Con Edison, the New York

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* The provisions of Section 21(b) of the Federal Water Quality Improvement Act of 1970 were incorporated into Section 401 of the 1972 Amendments and are now codified at 33 U.S.C. § 1341.

District Engineer, Colonel Harry W. Lombard, advised the company that "at the present time" a separate permit under Section 404 would not be required (104a). The same advice was given by the District Engineer in response to a demand by Scenic Hudson that hearings be held prior to the issuance of dredging and filling permits for the Storm King project. In his letter of March 27, 1973, Colonel Lombard stated that no additional permits would be required and that therefore no hearings would be held (34a).

The force of this advice was cast in doubt by the promulgation of proposed regulations amending 33 CFR § 209.120, published in the Federal Register on May 10, 1973. 38 F.R. 12217-12230. These proposed regulations, entitled "Permits for Activities in Navigable Waters and Ocean Waters," were issued by the Acting Director of Civil Works of the Army Corps of Engineers with the prefatory notice that they were to provide interim guidance to all Army Corps installations until final regulations were issued. Subsection 209.120(c)(6) of the proposed rules provided specific guidance with respect to hydroelectric projects licensed by the Federal Power Commission. It restated the long standing rule that no Section 10 permit under the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, would be required and that the procedure for granting approval of project structures affecting navigation by way of letter to the FPC pursuant to Section 4(e) of the Power Act, 16 U.S.C. & 797(e), would suffice. However, a different rule was proposed with respect to Section 404 permits:

> "In all cases involving the discharge of dredged or fill material into navigable waters . . . Department of the Army permits under Section 404 of the Federal Water Pollution Control Act . . . will be required." Proposed Regulation, 33 CFR Part 209, § 209.120(c)(6), 38 F.R. 12217, 12218.

On October 16, 1973, after the commencement of this lawsuit, the New York District Engineer formally notified Con Edison that a Section 404 permit would be required

for the discharge of any fill materials in connection with the Storm King project (105a). Thus, the Third Claim for Relief in the Scenic Hudson complaint, seeking to have the Army Corps of Engineers require Con Edison to apply for a Section 404 permit, became moot (28a-31a).

The Court entered judgment for Scenic Hudson enjoining Con Edison from discharging dredged or fill material into the Hudson River in connection with the Storm King project unless and until the company obtains a permit under Section 404 (160a). Subsequently, on January 11, 1974, Con Edison filed an application with the New York District Engineer for a Section 404 permit. On February 26, 1974 the New York District Engineer issued a notice advising the public of the application and providing affected parties the opportunity for a hearing. The Army is presently studying the comments it has received in response to the notice. Meanwhile, because of a statutory requirement that construction on the project must be begun before October 1, 1974, Con Edison plans to commence drilling and removing granite from the base of Storm King mountain in the near future.*

Relevant Statutes

Federal Water Pollution Control Act Amendment of 1972,

Title 33, United States Code 1251 *et seq.*

Section 301(a), 33 U.S.C. § 1311(a)

> Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

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* Section 13 of the Power Act, 16 U.S.C. § 806, provides that the license be terminated for failure to commence construction within two years unless an extension is sought. Only one extension of two years is permitted. Under these circumstances Con Edison is justified in relying on its discarded slogan—"Dig we must."

Section 404, 33 U.S.C. § 1344

(a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

(b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary of the Army, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 403(c), and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary of the Army. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

Section 502(6), 33 U.S.C. § 1362(6)

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt adn industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

Federal Water Power Act of 1920 as amended,

Title 16, United States Code 791a *et seq.*

Section 28, 16 U.S.C. § 822

> The right to alter, amend, or repeal this chapter is expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this chapter or the rights of any licensee thereunder.

Applicable Regulation

Proposed Rules, Department of the Army, Permits for Activities in Navigable Waters or Ocean Waters, 38 Federal Register 12217-12230 (May 10, 1973), 33 Code of Federal Regulations, Part 209

§ 209.120(c)(6)

The Federal Power Act of 1920 (41 Stat. 1063; 16 U.S.C. 791a *et. seq.*), as amended, authorizes the Federal Power Commission (FPC) to issue licenses for the construction, operation and maintaining of dams, water, conduits, reservoirs, powerhouses, transmission lines, and other physical structures of a power project. However, where such structures will affect the navigable capacity of any navigable waters of the United States (as defined in 16 U.S.C. 796), the plans for the dam or other physical structures affecting navigation must be approved by the Chief of Engineers and the Secretary of the Army. In such cases, the interests of navigation should normally be protected by a recommendation to the FPC for the inclusion of appropriate provisions in the FPC license rather than the issuance of a separate Department of the Army permit under 33 U.S.C. 401 *et seq.* As to any other activities in navigable waters not constituting construction, operation, and maintenance of physical structures licensed by the FPC under the Federal Power Act of 1920, as amended, the provisions of 33 U.S.C. 401 *et seq.* remain fully applicable. In all cases involving the discharge of dredged or fill material into navigable waters or the transportation of dredged material for the purpose of dumping in ocean waters. Department of the Army permits under section 404 of the Federal Water Pollution Control Act, or under section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 will be required.

ARGUMENT

POINT I

Hydroelectric projects licensed by the Federal Power Commission are not exempt from compliance with the 1972 Amendments.

On October 18, 1972 Congress enacted, over presidential veto, amendments to the Federal Water Pollution Control Act. Although denominated as "Amendments" this comprehensive legislation had the effect of rewriting entirely the basic statute.* The objective of the 1972 Amendments was set forth in sweeping terms:

> ". . . to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. . . ." Section 101(a) of the 1972 Amendments, 33 U.S.C. § 1251(a).

To insure that this objective was met, primary responsibility for the enforcement of the Act was vested in the Administrator of the recently created Environmental Protection Agency ("EPA"). Section 101(d) of the 1972 Amendments, 33 U.S.C. § 1251(d). The EPA Administrator's jurisdiction was to be exclusive "[e]xcept as otherwise expressly provided in this Act." *Ibid.* As further evidence of the seriousness of its purpose, Congress declared in Section 301(a) of the 1972 Amendments, 33 U.S.C. § 1311(a), that with certain specified exceptions "the discharge of *any* pollutant by *any* person shall be unlawful." [Emphasis added.] The exceptions are few in number, tightly con-

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* The Federal Water Pollution Control Act was first passed in 1956. Prior to 1972 it had been amended by the Water Quality Act of 1965, the Clean Water Restoration Act of 1966, and the Water Quality Improvement Act of 1970. The 1972 Amendments replaced all of this prior legislation.

trolled and designed to restrict rather than to encourage the discharge of pollutants. Significantly, the 1972 Amendments fail to provide any exemption from the broad prohibition of Section 301(a) for hydroelectric projects licensed by the Federal Power Commission. Thus, by their terms the 1972 Amendments preclude Con Edison from discharging any fill material into the Hudson River in connection with the construction of the licensed project at Storm King unless the company first obtains a permit from the Army Corps of Engineers under Section 404, one of the specified exceptions to Section 301(a).

Consistent with the overall philosophy of the 1972 Amendments to restrict the discharge of pollutants several important safeguards for the protection of the environment have been written into the Section 404 permit procedures. Although primary responsibility for the issuance of these permits has been shifted to the Secretary of the Army, the EPA Administrator has retained considerable influence and, under certain conditions, an effective veto. Subsection (b) provides that the Administrator shall develop guidelines for the specification of disposal sites, which guidelines are to be applied by the Secretary of the Army in granting permits. Subsection (c) authorizes the EPA Administrator to prohibit the specification of any defined area as a disposal site. A further safeguard is provided by subsection (a) which requires that the Secretary of the Army must first give "notice and opportunity for public hearings" before the issuance of any section 404 permit.

Despite the broad prohibition set forth in Section 301(a) against *any* discharge of pollutants * by *any* person, and

* "Pollutant" is defined as including dredged spoil, rock and sand. Section 502(6) of the 1972 Amendments, 33 U.S.C. § 1362 (6). Con Edison does not contend that the fill material it expects to place in the river is not a pollutant within the meaning of the 1972 Amendments.

despite the narrow scope of the enumerated exceptions to this prohibition, Con Edison asserts that it need not apply for a permit for a discharge of fill material into the Hudson River at the Storm King project site. The basis for this assertion is a claim that Congress long ago provided for comprehensive regulation of hydroelectric projects by passage of the Federal Water Power Act of 1920,* that it did not intend to displace the primacy of the Federal Power Commission in regulating hydroelectric projects when it passed the 1972 Amendments and that the 1972 Amendments are therefore inapplicable to licensed hydroelectric projects. (Con Edison Appellant Brief, pp. 18-21, 24-29).

This analysis, although superficially appealing, moves too quickly to its conclusion. Had the 1972 Amendments been the makeshift product of little noticed legislative effort, one might be warranted in concluding that Congress gave little thought to the statute's implications. However, this bill was not put together and passed in the last hurried days of the legislative session. Rather, as described by Senator Edmund S. Muskie, a principal sponsor, it was "the product of a monumental effort including: 19 days of public hearings in Senate and House, 45 mark-up sessions in the Senate Committee, and many hours of mark-up in the House, 39 sessions of the Senate-House Committee of Conference, and several days of Senate and House floor debate." Congressional Service Committee, Library of Congress, *Legislative History of the Water Pollution Control Act Amendments of 1972,* 93rd Cong., 1st Sess. (Jan. 1973) Volume I, p. iii. (Hereafter *"Legislative History"*). Nowhere in the extensive legislative history is there the slightest suggestion that the broad prohibition against the discharge of pollutants into the navigable waterways would be inapplicable to hydroelectric projects licensed by the Federal

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* The Federal Water Power Act of 1920 became Part I of the present Federal Power Act. Both enactments are referred to interchangeably in this brief as "the Power Act".

Power Commission. It is inconceivable that in a bill each line of which has been picked over so carefully Congress would have taken no note of the total exclusion of such a large class from coverage. It is submitted that no such exclusion was ever intended.

Con Edison attempts to buttress its argument by pointing to the comprehensive nature of the Federal Water Power Act of 1920. It is readily conceded that when passed this legislation was intended to pull together into one licensing authority the various regulatory functions *previously* exercised by the Secretaries of War, Interior and Agriculture over hydroelectric projects. Indeed, Section 29 of the Act, 16 U.S.C. § 823, repealed all prior legislation that was inconsistent with the new statute. Thus, for example, Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, was deemed to be no longer applicable to such hydroelectric projects because of the inconsistent provisions of Section 4(e) of the Power Act, 16 U.S.C. § 797(e). On this point the Government was in agreement with Con Edison in the District Court below.

But the force of the Power Act was to centralize the existing or previously exercised regulatory authority of the three named departments into one Commission. It certainly did not purport to arrogate to the new Commission regulatory authority which had previously been exercised over hydroelectric projects by other Government agencies. Thus even Con Edison concedes that the "all encompassing" Power Act is insufficient to insulate the company from compliance with tax, labor and other statutes. (Con Edison Appellate Brief, p. 31). Nor did the Power Act purport to preclude future Congresses from enacting legislation to regulate other forms of activity by FPC licensed projects. One such enactment was the Federal Water Quality Improvement Act of 1970 which required licensees of the FPC to first obtain a *state* water quality certificate. Senator Muskie, in describing the intent behind the 1970 Act,

evinced no doubt that FPC licensed projects such as Storm King were to be subject to this form of additional state regulation:

> "Any new industry that intends to locate on the navigable waters of the United States; that needs a permit to build a dock, a discharge pipe, a water-intake pipe, a bridge or a road across Federal lands; that requires a license for a nuclear power plant or a license from the Federal Power Commission to build a dam will be required to obtain this certification of compliance with water quality standards.
>
> "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standards. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards." 116 Cong. Rec. S 8984 (March 24, 1970).

Con Edison apparently recognized that government agencies other than the Federal Power Commission could exercise jurisdiction over the water pollution aspects of the Storm King project. For, it promptly sought and obtained a water quality certificate from the State of New York pursuant to section 21(b) of the 1970 Act (45a-46a). It is therefore difficult to perceive the basis for the company's current claim that FPC licensed projects are exempt from the provisions of the 1972 Amendments.

Con Edison points to two provisions of the Power Act as support for its contention that the authority of the Federal Power Commission to regulate hydroelectric plants is exclusive: Section 4(e), 16 U.S.C. § 797(e), and Section 23(b), 16 U.S.C. § 816(b). But, section 4(e) simply authorizes the Commission to issue licenses for, *inter alia,* the construction of hydroelectric project works. Section 23(b), in turn, makes it unlawful for any person to, *inter alia,* construct project works in any of the navigable waters of the United States "except under and in accordance

with the terms of a . . . license granted pursuant to this act." 16 U.S.C. § 816(b). We submit that this language hardly warrants Con Edison's bold conclusion that it "leaves no room for conflicting regulation by another federal ageny." (Con Edison Appellant Brief, p. 19). The language of Sections 4(e) and 23(b) does nothing to prohibit Congress from passing legislation that would require hydroelectric projects, among others, to seek *additional* federal permits from other federal agencies pursuant to other federal regulatory schemes.

Con Edison has cited a wealth of cases * for the proposition that in enacting the Federal Water Power Act of 1920 Congress intended to centralize authority over hydroelectric projects in one federal agency. But these cases stand for nothing more than the proposition that the Act "was designed to vest in the Commission for the future, the control and jurisdiction which Congress had previuosly exercised . . ." *Northwest Paper Co.* v. *F.P.C.*, 344 F.2d 47, 52 (8th Cir. 1965). But obviously Congress had not "previously exercised" any jurisdiction with respect to the prohibition of the discharge of pollutants by hydroelectric projects or with respect to the issuance of permits such as in question here. It did not do so until 1972 when it passed extensive regulatory legislation and specified that a permit under Section 404 be obtained from the Secretary of the Army.

We are told that there is "ample authority" in the Power Act to govern the discharge of fill material by hydroelectric projects into navigable waters. (Con Edison Appellant Brief, pp. 32-33). It is true that Section 10(b), 16 U.S.C. § 803(b), forbids the alteration of project works after a license has issued without the prior approval of the Com-

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* See *Northwest Paper Co.* v. *F.P.C.*, 344 F.2d 47 (8th Cir. 1965) and other cases cited at p. 21 of the Con Edison Appellant Brief.

mission. And, Section 10(c) requires that the licensee "shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health and property. . . ." 16 U.S.C. § 803(c). But this is rather loose and insubstantial authority for the granting of permits of the sort prescribed by Section 404 of the 1972 Amednments.* As pointed out by the District Court below, Section 404

> "... conditions discharge of dredged or fill materials on approval by two federal agencies, granted pursuant to specific guidelines designed to protect the environment. Their approval is mandatory under the 1972 Amendments, whereas F.P.C. compliance with § 404 would be merely voluntary" (153a).

The fact that it may be *possible* for the Federal Power Commission to institute procedures** along the lines required by Section 404 of the 1972 Amendments is clearly insufficient grounds to deny this authority, insofar as hydroelectric projects are concerned, to the Army Corps of Engineers and EPA.

The Army has already issued proposed regulations*** which assert in clear terms that Section 404 permits will be required for the discharge of fill material by hydroelectric

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* An attempt by the FPC to require licensed projects to apply for such permits would most likely invite a court challenge to the agency's statutory authority for so doing.

** The Federal Power Commission has not published any procedures for the issuance of permits pursuant to Section 404 of the 1972 Amendment. Nor has Con Edison indicated that it intends to seek such a permit from the Federal Power Commission.

*** As noted, *supra*, the preamble to these proposed regulations make clear that they are to serve as interim guidance to all districts of the Army Corps of Engineers until final regulations are issued.

projects licensed by the Federal Power Commission. 38 F.R. 12217, 12218 (May 10, 1973). The Federal Power Commission does not dispute this assertion of jurisdiction by the Army.

Finally, Con Edison asserts that FPC licensed projects enjoy a status analogous to projects licensed by the Atomic Energy Commission insofar as being exempt from compliance with the 1972 Amendments. The short response is that the legislative history of the 1972 Amendments is explicit in providing an exemption for AEC licensed projects. This is in stark contrast to the complete absence of any mention of a similar exemption for FPC licensed projects. Further, the scope of the exemption for AEC licensed projects is a very narrow one.

Section 502(6) of the 1972 Amendments, 33 U.S.C. 1362(6), defines a pollutant as including "radioactive materials". Because the Atomic Energy Act of 1954 had already established exclusive jurisdiction in the Atomic Energy Commission over "source", "byproduct", and "special nuclear materials" as defined by that Act, 42 U.S.C. §§ 2014(e), (z), and (aa), there was concern, especially among members of the Joint Committee on Atomic Energy, that the use of the broad term "radioactive materials" in the 1972 Amendments would extend EPA's powers into this very sensitive area controlled by the AEC. Senator Pastore put the question directly to Senator Muskie as follows:

> My question is this: Does this measure that has been reported by the committee in any way affect the existing law, that is, the existing Atomic Energy Act of 1954, insofar as the regulatory powers of the AEC are concerned with reference to radioactive material?
>
> Mr. Muskie: It does not; and it is not the intent of this Act to affect the 1954 legislation.
>
> Mr. Pastore: In other words, this bill does not change that feature of the Atomic Energy Act in any regard?

> Mr. Muskie: That is correct. [117 Cong. Rec. S. 17401-402 (November 2, 1971)].

The House Report of the Committee on Public Works, Report No. 92-911, states explicitly that "'[r]adioactive materials' encompassed by this bill* are those beyond the jurisdiction of the Atomic Energy Commission". *Legislative History, supra,* Vol. I, pp. 753, 818. The debate on the floor of the House confirmed the legislative intent that regulation over "radioactive materials" as a pollutant was not to impinge on the exclusive authority of the AEC over "source", "byproduct" and "special nuclear material" as defined by the Atomic Energy Act of 1954. 118 Cong. Rec. H 2625, H 2639 (March 28, 1972); 118 Cong. Rec. H 9115 (Oct. 4, 1972).

It is significant that no legislator suggested that AEC licensed facilities would be or should be exempt from regulation under the general terms of the 1972 Amendments. The inference is clear that except as to the discharge of "source", "byproduct", and "special nuclear material" (which are not pollutants) such facilities are subject to the 1972 Amendments. If construction of an AEC licensed facility entails the discharge of fill material in navigable waters, then a Section 404 permit must be obtained from the Secretry of the Army. *Colorado Public Interest Research Group, Inc.* v. *Train,* Civil Action No. C-5438 (D. Colo. Feb. 15, 1974) cited by Con Edison is not authority otherwise. That case merely confirms that it was the legislative intent to exclude "source", "byproduct" and "special nuclear material", as regulated by the AEC, from the definition of "pollutant" in the 1972 Amendments.

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* Report No. 92-911 accompanied H.R. 11896, the House version of the Act. The Senate version, S. 2770, was eventually enacted into law. Significantly both versions used the same language in defining "radioactive materials" as a "pollutant".

The conclusion is inescapable—and the plain language of the statute dictates—that the operators of hydroelectric projects licensed by the Federal Power Commission, no less than other persons, are subject to the 1972 Amendments. The jurisdiction of the FPC is not so extensive as to preclude compliance by its licensees with other duly enacted regulatory schemes.

POINT II

Section 28 of the Power Act does not preclude the application of the provisions of the 1972 Amendments to the Storm King project.

The license to construct and operate the Storm King project was issued by the Federal Power Commission on August 19, 1970. Subsequently, on October 18, 1972, Congress passed the 1972 Amendments to the Federal Water Pollution Control Act. Con Edison advances as an alternative argument the proposition that if the provisions of the 1972 Amendments are deemed applicable to hydroelectric projects then the effect of such legislation is an amendment to the Power Act. Therefore, it concludes, by the terms of Section 28 of the Power Act, 16 U.S.C. § 822, the 1972 Amendments are inapplicable to licenses already issued by the FPC. The all too obvious answer to this novel proposition is that the 1972 Amendments were just as they claimed to be—amendments to the Federal Water Pollution Act and not to the Power Act.

The sparse legislative history * with respect to Section 28 adds little to what one would deduce from the obvious

* The bill was described as proposing a method "by which the water powers of the country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the

[Footnote continued on following page]

words of the statute. In essence, the Congress of 1920 wished to make clear that the Power Act could be amended as time and experience indicated the necessity therefor. The obvious corrolary to a power to amend the statute is that licenses already issued should not be adversely affected by any such amendment. This is nothing more than a re-statement of the principle that parties should be able to rely on their expectations at the time a license is sought and obtained.*

The 1972 Amendments constitute a law of general application the purpose of which is "to restore and maintain the . . . integrity of the Nation's waters". Section 101(a) of the 1972 Amendments, 33 U.S.C. § 1251(a). One searches in vain for specific reference in the 1972 Amendments to hydroelectric projects or to any interest defined and protected by the Power Act. Thus there is no basis for a conclusion that in reality the 1972 Amendments were intended to amend the Power Act. We respectfully submit that the District Court was correct in concluding that Section 28 "was not intended to insulate FPC licensees from the effect of general congressional legislation for the term of their licenses, but only to protect them from ex post facto lawmaking relating specifically to FPC license requirements" (157a).

Con Edison's brief offers *en passant* the observation that its situation is comparable to that where the selective service law was found to have been partially repealed or altered by a later amendment to the immigration act (Con Edison

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same time protect and preserve every legitimate public interest." House Report No. 61, 66th Cong. 1st Sess., cited in Senate Committee on Commerce Report No. 180, p. 5. Security for invested capital was provided in sections of the bills dealing with the disposition of property at the termination of the license and the definition of such terms as "net investment". There is no suggestion that licensees are to enjoy a vested right to be free from other valid federal regulations. See 56 Cong. Rec. 2942 (March 2, 1918).

*Not surprisingly, no case law has developed with respect to the meaning of Section 28. See 16 U.S.C.A. § 822.

Appellant Brief, p. 27, footnote). However, the cited case, *Application of Mirzoeff,* 253 F.2d 671 (2d Cir. 1958), provides little support for a theory of silent or indirect amendment by one statute of another. That case involved a clearly stated interrelationship between two statutes affecting a resident alien's right to naturalization as conditioned by a refusal to perform military service. The key to that decision is found in the language of the Immigration and Nationality Act of 1952. Section 403(b), 8 U.S.C. § 1101 (Historical Note) provided:

> "[E]xcept as otherwise provided . . . all other laws, or parts of laws in conflict or inconsistent with this Act are, to the extent of such conflict or inconsistency, repealed."

Accordingly, the Court found that a provision of the earlier enacted Selective Service and Training Act of 1940 had been repealed to the extent that it contained a more drastic bar to naturalization than that set forth in the Immigration and Nationality Act of 1952. *Application of Mirzoeff, supra,* at 673.

Con Edison attempts to lend force to the conclusion that the 1972 Amendments are in fact an amendment to the Power Act in the following manner: The District Court found, it is claimed, that the 1972 Amendments and the Power Act were inconsistent wtih each other to the extent that the 1972 Amendments set forth a regulatory program to prevent the discharge of pollutants which was detailed and mandatory whereas the Power Act, at best, allowed the Federal Power Commission to establish such controls voluntarily.* Thus, it is contended, the District Court "must

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* The District Court's finding that there was in inconsistency was in response to Con Edison's contention that Section 511(a) of the 1972 Amendments preserved the all encompassing authority of the FPC over hydroelectric projects. That section reads:

[Footnote continued on following page]

have concluded" that the FPC's authority under the Power Act was "limited" by the 1972 Amendments and that therefore the Power Act was amended by the 1972 Amendments.

There are two answers to this argument. First, the 1972 Amendments are not inconsistent with the Power Act. The authority to license the construction and operation of hydroelectric projects is vested in the Federal Power Commission by Sections 4(e) and 23(b) of the Power Act, 16 U.S.C. §§ 797(e) and 816(b). However, if such licensed projects seek to discharge pollutants into navigable waters in connection either with their construction or operation, the 1972 Amendments impose the *additional* requirement that the license holder seek a permit from the Army Corps of Engineers and/or the EPA. Thus there is nothing inconsistent between the two statutes. The Federal Power Commission is free to continue to exercise the authority conferred upon it by the Power Act; and, the Secretary of the Army and EPA Administrator are free to exercise their separate responsibilities under the 1972 Amendments.

Secondly, even if we were to accept the contention that the two statutes are inconsistent with each other in the manner described by the District Court, the inconsistency is not of the sort as to effect a repeal of any part of the Power Act. The inconsistency, such as it may exist, is that the 1972 Amendments contain a detailed mandatory pattern for controlling the discharge of pollutants whereas the Power Act vests the FPC with such general authority that it could, if it wanted, control the discharge of pollutants thruogh its licensing procedures.* This inconsistency is far

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"This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter." 33 U.S.C. § 1371(a).

* The FPC has not chosen to impose controls over the discharge of pollutants as set forth in the 1972 Amendments either before or after 1972.

too vague and conceptual to warrant the conclusion that there has been a repeal of specific sections of the Power Act. Since "[t]he cardinal rule is that repeals by implication are not favored", *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968), we submit that no repeal or amendment to the Power Act has occurred. At best, Section 511(a) of the 1972 Amendments, 33 U.S.C. § 1371(a), is a limitation on potential but previously unexercised powers of the FPC. It works no repeal of any portion of the Power Act. Only the Federal Water Pollution Control Act has been amended.

Thus, Section 28 of the Power Act does not insulate the Storm King project from compliance with Sections 301(a) and 404 of the 1972 Amendments.

CONCLUSION

The appeal of Con Edison from that part of the judgment holding that the Storm King project is subject to the permit requirements of Section 404 of the 1972 Amendments should be dismissed and the judgment affirmed.

Respectfully submitted,

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Dated: New York, New York
April 22, 1974

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AFFIDAVIT OF MAILING

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County of New York) ss

Pauline Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 22nd day of April 19 74 she served a copy of the within

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Pauline Troia

Sworn to before me this

22nd day of April 19 74

Walter G. Brannon

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Notary Public, State of New York
No. 24-0394500
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